IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7477 OF 2005

Shri Shashikant R.Modi .. Petitioner

Vs.

Mangal W/o Chandrakant Modi & Anr..Respondents

Mr.R.P.Walvekar for the petitioner

Mr.S.V.Sadavarte for the respondent no.1

CORAM : S.U.KAMDAR, J
DATED : 14TH DECEMBER, 2005

P.C.:

1. The present petition is challenging the order dt.8.7.05 by which the appeal of the petitioner before the 3rd Additional District Judge, Kolhapur has been dismissed. The appeal was filed against the order of the learned Trial Court who has dismissed the application for condonation of delay of 105 days in Misc.Application no.272 of 2002 for setting aside an exparte decree.

2. The main ground on which exparte decree is sought to be set aside is that suit was originally instituted in Civil Judge Senior Division.

However, subsequently, with the amendment of pecuniary jurisdiction of the court being enhanced the suit stood transferred to the Junior Division. Original Spl.Civil Suit no.838 of 1998 was renumbered as 1988 of 2000. It is the case of the petitioner that the petitioner was given no notice of transfer of the said Civil Suit. However, Trial court and appellate court has given a finding that Advocate Malkar was attending the matter even after transfer of suit and thus, he had notice of transfer of suit to lower court.

3. It is not in dispute that the said Advocate Malkar who was attending the matter expired and thus the matter could not be conducted and exparte decree has been passed. The learned Appellate court has however, contended that since Malkar attended the matter petitioner had knowledge of the said transfer of suit and therefore petitioner should have conducted the said litigation.

4. The learned counsel for the respondent has however further contended that in the original suit, Vakalatnama was not filed only on behalf of

Mr. Malkar but other four advocates have also filed the joint Vakalatnama and therefore there is no substance in the ground that Mr.Malkar Advocate expired and thus matter could not be looked after and an exparte decree is passed.

5. In my opinion, once the suit is transferred and thereafter only one advocate has attended the matter who is Advocate Malkar before the Civil Judge, Junior Division and he has admittedly expired, this would be a fit case in granting of condonation of delay in applying for setting aside the exparte decree.

6. The trial court and appellate court has erred in rejecting the application for condonation of delay on aforesaid ground. Thus, I am of the opinion, that it is in the interest of justice that the impugned order dt.8.7.04 is set aside. Accordingly , impugned order dt.8.7.04 in Misc.Civil Appeal No.103 of 2004 is quashed and set aside. Delay in taking out application for setting aside exparte decree of 105 days is condoned. Petitioner is directed to pay cost quantified at

Rs.5000 to respondent no.1. Cost to be paid within 2 weeks. On said cost being paid, trial court shall proceed and decide the application for setting aside the exparte decree on its own merits and without in any way being influenced by the impugned order passed herein.